

LU (Migration) [2017] AATA 2887 (14 December 2017)

CORRIGENDUM

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms SHUXIANG LU
CASE NUMBER:	1609324
DIBP REFERENCE(S):	CLF2013/3201
MEMBER:	Robert Wilson
DATE:	14 December 2017
DATE CORRIGENDUM	
SIGNED:	4 January 2018
PLACE OF DECISION:	Sydney
AMENDMENT:	The following corrections are made to the decision:

In paragraph 84, the sentence "The sponsor stays at home and looks after her son who is 6." contains an incorrect fact and is to be deleted.

Robert Wilson
Member

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Ms SHUXIANG LU

CASE NUMBER: 1609324

DIBP REFERENCE(S): CLF2013/3201

MEMBER: Robert Wilson

DATE: 14 December 2017

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:

- cl.801.221(2)(c) of Schedule 2 to the Regulations

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2:24pm

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Statement made on 14 December 2017 at

CATCHWORDS

Migration – Partner (Residence) (Class BS) visa – Subclass 801 (Spouse) – Genuine continuing spousal relationship – Joint finances – Long term relationship – Supporting statutory declarations and witnesses – Companionship and emotional support

LEGISLATION

Migration Act 1958, ss 5F, 65

Migration Regulations 1994, r 1.15A, Schedule 2, cl 801.221, cl 820.221

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

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STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 21 June 2016 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 28 December 2012 on the basis of her relationship with her sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221(2) because the delegate was not satisfied that the applicant was the spouse or de facto partner of the sponsor.
4. The applicant appeared before the Tribunal on 5 December 2017 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor, Mr Yong Chun Qian and three witnesses. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
5. The applicant was represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant: cl.820.221(2)(c). The sponsor is an Australian citizen. The Tribunal considered the circumstances of the parties as set out in r.1.15A(3) in forming an opinion as to the matters in s.5F(a)-(d). The evidentiary basis for the Tribunal's findings is the oral evidence as provided at hearing by the applicant, the sponsor; and documentary evidence as filed.
8. **Are the parties validly married?**
9. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The applicant has provided a NSW Marriage Certificate which shows that the applicant and the sponsor were married on 20 September 2012 at 87 Burwood Road, Enfield, NSW. A Certificate of Marriage was also provided with the same details. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).
10. **Are the other requirements for a spousal relationship met?**
11. Financial aspects
12. The Tribunal discussed the lives of the parties at length, including their living arrangements; their finances; their commitment to each other; broader recognition of their relationship; and

the undertaking of any social activities together. The Tribunal is satisfied that the parties have lived together in Australia. The applicant works as a taxi driver and he earns \$600-\$800 a week. The sponsor works in a swimwear factory in Sydney and she usually earns \$500-\$600 a week.

13. The applicant and the sponsor have almost paid off the home unit in which they live in Campsie, a suburb of Sydney. The property is in the sponsor's sole name. They have jointly purchased electrical appliances for their home including a range hood, fridge, air-conditioner and washing machine.
14. They have joint cards for their joint account at the Commonwealth Bank, organised in 2015.
15. The sponsor has a superannuation account with Westpac. The sponsor has approximately \$60,000 in his superannuation account.
16. The applicant is appointed as his beneficiary 100%.
17. The sponsor has a daughter, Shaiyun Qian, from his ex-wife. The daughter is 33 years old. She lives in Sydney. The applicant said when the bank account was first opened there were no expenses involved because she did not go to work at that time and she did all the shopping for daily life, normally in 'Chinese-run' shops. The card would only be allowed by the shops that she frequented. Otherwise, there would be a surcharge for the use of this type of card. She did not speak much English so she did not use this card in the 'local Australian' shops; so she did not go to those shops. She could not use this card when she was not employed. Regarding the transfer of funds the applicant's explanation was as follows. When she and her husband first opened this account the bank said they had to have eight transactions, or more, a month or they had to pay a five dollars penalty. Later, her husband got bored with all these transactions and stop doing all of these things.
18. Regarding withdrawal of money, the applicant was not used to using cards at ATM machines. However, later she started to use her card.
19. The applicant and the sponsor do not have any joint liabilities or debts.
20. Neither the applicant nor the sponsor has made a will.
21. The sponsor has life insurance and pays in \$159 a month and has done so for many years. There is a dividend paid every couple of years. The applicant has taken out retirement insurance which includes safety insurance.
22. The sponsor said that most items in their house have been purchased with the sponsor's money and the applicant's money is kept by the sponsor in a separate account, on a six month term deposit with Westpac.
23. Regarding day-to-day expenses, the applicant receives \$50 a week for these from the sponsor. She is thrifty and all of the food expenses for the week costs no more than \$50.
24. The applicant said that the sponsor saves her money. He is keeping it for when they retire so that as they get older they will have something to spend. Further, the applicant and sponsor rent a small room in their unit to another person, Mr Weizhou Li. The tenant moved in at the end of July 2016 and is still present. He pays \$170 per week. During the applicant's two trips to China, her father-in-law gave her AUD \$10,000 in 2014 and the same amount in 2015, when she went back to China with her husband. These are the only two trips she has made back to China. The father-in-law is still alive, but he has not visited Australia.

25. The applicant and the sponsor also bank with the Westpac Bank.

26. The Tribunal gives weight to this evidence.

27. The nature of the household

28. The unit that they live in at Campsie has two bedrooms. One is used for the applicant and the sponsor, and the tenant uses the other bedroom.

29. There is also a kitchen, bathroom, lounge room, laundry, small balcony; and a garage downstairs.

30. The applicant works from 8 to 5 PM Monday to Friday. She catches the 7 AM train. She arrives home at 5:30.

31. The sponsor wakes up and goes to work at 12 noon and comes back at midnight.

32. There is no care or joint responsibility for support of children.

33. The Tribunal gives weight to this evidence.

34. The social aspects of the relationship

35. The applicant introduces the sponsor as her husband. Likewise the sponsor introduces the applicant as his wife. Everyone knows that she is his wife.

36. The photographs of the applicant and the sponsor, their family, friends and relatives both in Australia and the PRC have been provided and contain captions; in the Departmental file and the Tribunal file.

37. Ms Liping Lin provided a statutory declaration declared on 15 November 2012 in which she wrote the following. She has known the sponsor since she migrated to Australia in 1996, through her husband. The sponsor is a close friend of her husband and her family. He is an honest person who always helps others. They were very glad to hear the sponsor had started to date the applicant through the Internet. The applicant and the sponsor visited the witness and her family almost every week.

38. The witness believes a relationship between the applicant and sponsor is very genuine and will be continuing. She can easily see the attraction they are showing between them. She and her husband were happy to be witnesses at their wedding. Since the sponsor came to Australia, both of them are doing wonderfully in terms of creating a warm family.

39. Ms Liping Lin provided a further statutory declaration declared on 26 April 2016 and she wrote the following. She has known the sponsor through her husband since she came to Australia in 1997. The sponsor is a good friend of her husband and a regular visitor to their house. She has known the applicant since she came to Australia in 2012. She believes the relationship between the applicant and sponsor is genuine and continuing. They are two close families and they visited each other often the she and her husband were the witnesses at the marriage ceremony for the applicant and sponsor. They could see the excitement when the applicant and sponsor were married. They have looked after each other since.

40. Ms Hua Li provided evidence through a statutory declaration declared on 14 November 2012. The witness knew the sponsor for over 18 years through one of the witness' high school classmates who was also a friend of the sponsor. The witness and the sponsor are very close friends and see each other on a weekly basis. The witness first heard of the

applicant from the sponsor when they started dating each other on the Internet. They are frequent visitors to other houses.

41. The witness strongly believes the relationship between the applicant and sponsor is genuine and continuing. The sponsor is one of the closest friends of the witness and he is an honest person. The witness can see the obvious love between them since they go almost anywhere together. When the sponsor goes out to work the applicant does the house work and they enjoy the family's warm feeling.
42. Ms Hua Li also provided a statutory declaration declared on 29 March 2017.
43. She wrote that she is an old friend of the sponsor. She has known him for about 25 years and they were introduced by mutual friends. The sponsor told her about the applicant before she met her in person. After the applicant arrived in Australia for the first time five years ago the witness met her at a restaurant in Burwood with other friends.
44. The applicant met with the sponsor at least every fortnight. Usually he would come to her house and they would chat and have beer together. In the last few years, the witness always held a Christmas party at her home and the applicant and sponsor would attend together.
45. She attended their wedding in 2012 as a witness of their sealed love.
46. The applicant and sponsor have always been a caring and a deeply in love couple for all the years she has known them.
47. They are compatible in personality and they share everything in life. Whenever they attend the party at the witness' house, or another friend's place, they always came together. She has known the sponsor enough to know that he and the applicant are genuinely in love. Since the witness and the sponsor talk about almost everything, she knows what's happening most the time in their lives.
48. The applicant and the sponsor would go back to China on holidays to visit the applicant's family and friends there. They stayed at the applicant's hometown and spent some lovely days. After they came back to Australia they told the witness everything about their trip together.
49. In the witness' eyes, both the applicant and sponsor are nice people who prefer living a quiet and low-key life. Based on her understandings of them, she firmly believes that they share a genuine relationship and are determined to prolong it in the future
50. Mr Yong Chun Qian, the sponsor, provided a hand written statement dated 1 December 2012, as follows. He was divorced for many years. A person's life is not easy. Sometimes people are sick and there is no one to care for it and it is miserable. The applicant in Shanghai was introduced by a friend. She is a good woman with the virtues of the Chinese women of thrift, gentleness and kindness.
51. They are two close families and visit each other often. The witness and her husband were the witnesses at their marriage ceremony. They can see the excitement when they are married
52. Ms Shuxiang Lu, the applicant, provided a written statement dated 15 December 2012 she stated that she was introduced by a friend in Shanghai to Mr Qian. After a period of contact, the applicant concluded that he was a good man, thrifty and willing to help others. So she decided to marry him and take care of his life. Both sides of the family are very satisfied with their marriage. They will stand together for ever.

53. Jiung Lu, a witness wrote in his statutory declaration that he met the sponsor when he came to Australia in 1989. Since then they have become friends. The witness met the applicant when she came to Australia over three years ago. The witness attended their wedding. He regularly contacted them every 2 to 3 weeks. The witness strongly believes the relationship is genuine and continuing. He has seen they are doing a lot of things together, spending the weekends on the beach, shopping, visiting friends et cetera.
54. Mr Weizhou Li provided a statutory declaration declared on 29 March 2017. He stated that he is the tenant at the home of the applicant and the sponsor. He moved in about the end of July 2016 when he saw their advertisement and called them. He first met them at their home.
55. Since they are living under the same roof, he sees the applicant and sponsor almost every day. They live in a shared bedroom and they have quite regular daily routines. Through his conversations with them, he can feel that they are nice and kind people. Sometimes when the sponsor has time off, he would help the applicant prepare ingredients and cook together. For all he knows, they are a loving and caring couple living together.
56. Although he has not known the applicant and sponsor for a very long time, he believes that they are a genuine couple together and that their relationship will be continuing.
57. Everything he observed from the applicant and sponsor, they are a couple that behave and live just like any other normal couples. On Sunday mornings, he would always get up to see them having meals or tidying up the household together. He would see them talk about family matters like regular couples. The sponsor is a kind and patient man. He always smiles at the witness and would chat about their daily life. He would accompany the applicant to go grocery shopping and shoulders the heavy bags for her. The applicant's takes care of the household and would cook the sponsor's favourite dishes.
58. The witness knows that they would attend friends gatherings from time to time and they would go back to China together. For all he knows, they are a nice couple who live a simple and contented life together.
59. The sponsor has approximately \$60,000 in his superannuation account.
60. Mr Weizhou Li also provided evidence to the Tribunal at the hearing, as follows. Since October 2016 he has been renting a room in the applicant and sponsor's premises. The rent is \$170 per week. Since living with the applicant and sponsor they are all very friendly.
61. He is working every day from 6 AM to around 12 noon and from 4 PM to 8 PM. He does two shifts a day. He normally has a day off on Tuesdays when he meets the applicant and sponsor and talks with them. On other days he would see the sponsor rather than the applicant. When he meets them on the weekend they are talking to each other or they meet friends.
62. The witness indicated that the applicant and sponsor are definitely in a good marriage. He respects and appreciates the sponsor. He can learn a lot from him such as how to develop a relationship with his wife. In this way the witness can learn how to deal with his ex-wife and children.
63. Ms Sha Sha provided a statutory declaration declared on 21 February 2017. She wrote that the sponsor is a friend of her ex-husband. They used to live in the same area back in Shanghai and the witness has known him for about 34 years. The applicant was introduced to the witness by the sponsor at a dinner gathering one time. There were about 10 friends present at the table.

64. The witness likes to talk to the sponsor over the phone once a week and the applicant about once a month. But the witness would contact the applicant on we chat a few times each week. The applicant normally meets with them about once every two months and sometimes she would go to their home for dinner.
65. The witness knows the applicant and sponsor married in 2012 and she attended their wedding reception together with other friends and they offered their blessings.
66. Although the witness does not meet with the applicant and sponsor very often, they would go to each other's home as many times as possible. She enjoys having meals together with them in a casual and comfortable environment. The applicant and sponsor always appear affectionate towards each other in front of their friends. They help each other out with household chores and it is very easy to tell that they are a loving couple together.
67. Further the applicant and sponsor love to share what they are up to on their Wechat friends' group. As a result, the witness can often check their photos and see their common activities. In their spare time or on public holidays we would go out together and most times we would meet each other in Sydney CBD. The sponsor is a kind and nice person, and he treats the applicant with full patience. On the other hand, the applicant prepares everything well for sponsor and is always supportive of him. They are a truly lovely couple in her eyes.
68. All in all, the witness believes the relationship of the applicant and sponsor is genuine and continuing and she has no doubt that they will walk to the end of life together.
69. Ms Sha Sha also provided oral evidence at the Tribunal hearing. She stated that she is a friend of both the applicant and the sponsor. She has known the sponsor for 30 to 40 years. She has been in Australia since 1991.
70. The couple are in a good and happy relationship, a very genuine relationship. They have been living together at Campsie. She went to their place before they renovated. The sponsor has a picture of the applicant in his bedroom before the applicant arrived. The witness went to the wedding. The applicant and sponsor showed the renovations on Facebook. The wedding was held in the Chinese restaurant named 'Golden World.'
71. The witness stated that the couple are really happy together. They are always smiling. The husband's appearance has improved since he married the applicant.
72. Mr Hun Li provided oral evidence to the Tribunal at the hearing. He has been a friend of the sponsor for more than 25 years. They usually play a lot together with other persons. He lives in the Campsie area nearby. The witness also knows the applicant since she married the sponsor. The witness is married and his wife was not able to be present at the Tribunal hearing. He said she probably provided a statutory declaration.
73. Both the applicant and sponsor are in a genuine and continuing relationship. The witness and his wife were at their wedding. They play mah-jongg and cards and have dinner and drinks together.
74. The witness said that the applicant and sponsor have lived in the same unit in Campsie, at [residential address of applicant removed]. There are no children. The sponsor's mother passed away three years ago but the father is still living. The sponsor drives a cab and the applicant works in a clothing factory. They are definitely married. He does not know when they exactly met for the first time. It was a while ago. They married in 2012. They support each other, they do everything together including the shopping, to see the doctor together, and to see the witness.

75. At the Tribunal hearing the applicant and sponsor referred to the following. Regarding joint social activities, if a social invitation is extended to 1 or both of them, they discuss the invitation together before accepting or rejecting it.
76. The Tribunal gives weight to this evidence.
77. The nature of the persons' commitment to each other
78. The applicant and sponsor first met in November 2010 in China.
79. They became girlfriend and boyfriend, but did not date with each other immediately. They had contact with each other through the chat media such as QQ. They were living in different countries. When they chatted online the applicant was in China and the sponsor was in Australia
80. They started living together in October 2011 in Shenyang City, on the sponsors second trip, when they got to know each other. This was back in China.
81. They have been living together since then. The sponsor visited the applicant back in China as well as a few relatives. They were not living together at that point.
82. They started living together without any breaks since the applicant's arrival in Australia in August 2012.
83. They married on 20 September 2012
84. Regarding the degree of companionship and emotional support that the applicant and sponsor draw from each other, the sponsor would talk to the applicant to give solace to her. Further, the sponsor has problems with his lower back and the applicant massages it and sometimes she would soak his feet.
85. The sponsor massages the applicant's feet as she stands a lot at work during the day.
86. The applicant said at the hearing that she looks after the sponsor. She prepares his breakfast the night before for him to reheat in the microwave. Her husband has stomach problems and lower back pain so she often massages his lower back. She has very frail feet and the sponsor often offers her a massage.
87. Both the applicant and sponsor believe they are in a long-term relationship. They believe they are in a long term relationship and it is genuine and continuing. Since they have been in the relationship they have been together, no matter what happened. The applicant said the sponsor is everything to her. They live together.
88. They have a joint bank account. The sponsor stays at home and looks after her son, who is 6. They provided captioned photos of themselves with friends and relatives. The Tribunal is satisfied from all the evidence, but in particular the sponsor and applicant's consistent and spontaneous oral evidence at hearing, that the parties are committed to each other for the long-term, that they draw companionship from each other and see their relationship as long term, and that they have a sound understanding of each other as discussed at hearing. The Tribunal is satisfied their married relationship is more than 5 years long. From all the evidence, the Tribunal is satisfied that the applicant and sponsor meet the requirements of s.5F(2)(a)-(d) for a married relationship, and therefore satisfy the definition of 'spouse' as contained in s.5F of the Act.
89. The Tribunal gives weight to this evidence.

90. On the evidence before the Tribunal, the parties were married to each other under a marriage that is valid for the purposes of the Act: s.5F(2)(a). The Tribunal is satisfied that at the time of decision the applicant and sponsor had a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship is genuine and continuing. They therefore meet the requirements of s.5F(2)(b) and s.5F(2)(c) for a married relationship. The Tribunal is also satisfied that at the time of decision the parties meet the requirement of s.5F(2)(d)(i) for a married relationship in that they live together. For these reasons the Tribunal is satisfied that at the time of decision the parties were in a 'married relationship' within the meaning of s.5F(2) of the Act. Therefore, at the time of this decision the Tribunal is satisfied the applicant is the spouse, within the meaning of s.5F, of the sponsoring partner. Therefore, the applicant meets cl.801.221(2)(c). Given these findings, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria.

91. **DECISION**

92. The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:

- cl.801.221(2)(c) of Schedule 2 to the Regulations.

Robert Wilson
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.15A SPOUSE

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).